

## Chapter Six HISTORY

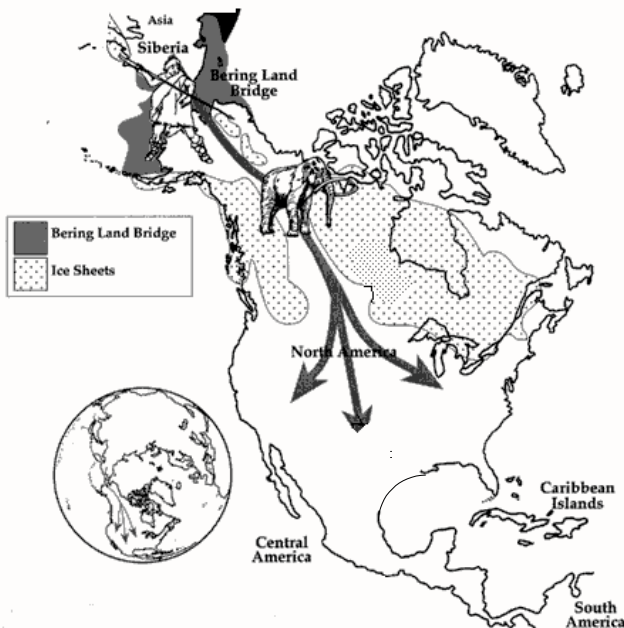
*Indian nations have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil ... The very term "nation," so generously applied to them, means "a people distinct from others."*

**John Marshall  
Worcester v. Georgia**

### Pre-Contact

Today's American Indians and Alaska Natives are the descendants of the people that migrated to this continent during the last Ice Age. The ice locked away huge amounts of ocean water, so the sea level dropped by more than 300 feet. Where the sea now separates Asia from North America at the Bering Strait, a bridge of land existed. About 50,000 years ago, small bands of people from Asia crossed this land bridge. Though there is some debate, they are widely regarded to have been the first North American settlers.

*Migration of the First Americans*



These first settlers came in waves and probably followed herds of wild animals, which they depended on for food. By 20,000 B.C. bands of hunters had spread throughout North America. It took about 10,000 years for their descendants to migrate south to reach the southern tip of South America.<sup>1</sup>

Between 10,000 and 5,000 B.C. the climate warmed. Many of the large animals that the early American Indians had depended on became extinct. They began to rely on hunting smaller animals, fishing and gathering for food. By about 3,500 B.C. Indians in what is now the Southwest learned to farm. With a stable food supply, Native American culture became more organized and Indian civilizations began to develop.

Among the most remarkable early civilizations were the Anasazi, who inhabited what is now the southwestern

United States and the Incas, Mayas and Aztecs of Central and South America.

### First Contact

Christopher Columbus landed on the Island of San Salvador in 1492, where he was greeted by Taino Indians. (It was Columbus who gave the people of the New World the name *Indios*. The word was later pronounced *Indian* by some Europeans.) As was their custom upon receiving a stranger, the Tainos presented Columbus and his men with gifts and treated them with honor. "...There is not in the world a better nation," Columbus wrote to the King and Queen of Spain. "They love their neighbor as themselves, and their discourse is ever sweet and gentle, and accompanied with a smile ...."<sup>2</sup>

When Europeans arrived on the shores of this continent around 1500, nearly 12 million people organized into roughly 600 tribes already inhabited the land that is now known as North America. Although tribes and their governments varied widely, the members of a tribe shared a common bond of ancestry, kinship, language, culture and political authority. Each tribe considered itself separate and independent or sovereign.

Sovereignty is the force that binds a people together and moves them to act together as a single entity. A sovereign possesses certain rights, including the right to structure its government according to the needs of the people and make and enforce its own laws.<sup>3</sup>

Europeans, however, often made the error of thinking that tribal people had no law or government. They made this mistake because the form and structure of tribal government differed radically from European models, just as tribal needs differed.

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### SOME RIGHTS OF SOVEREIGN NATIONS

- # Determine its own government structure according to the needs of the community
  - # Conduct foreign relations and trade with other nations
  - # Define its own membership
  - # Make and enforce its own laws
  - # Regulate its resources and property
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### TRIBAL GOVERNMENT IN THE EARLY DAYS

It is impossible to draw a general picture of traditional tribal governments. First, tribes were as unique 500 years ago as they are today. Second, the governments were continually evolving. Since government exists to meet the needs of its people, tribal government changed as the group did. When one tribe conquered or enslaved another, changes in government were of course very swift. Even tiny shifts in population or food supply had an impact on the group's needs, and the government adapted in response.

Some necessarily broad characteristics of early tribal governments are discussed below.

### **Central Role of Family Relations**

While acknowledging the diversity of tribal governments, there are some common characteristics. To begin, most of the tribal governing structure was based on kinship — birth and family position.

Usually leadership was inherited, such as the son taking the place of his father as leader, or leadership was decided by the leaders of family groups. These family clans were central in tribal governing structure.

The federal government is divided into many departments like agriculture, war and so forth. This kind of specialized organization makes government run more smoothly. The clan structure achieved roughly the same purpose.

The business of governing was divided up among clans, with each family group responsible for a certain duty. These governing duties were passed down from father to son, or mother to daughter, with each clan training its young to administer the clan's tribal duties. One clan might take care of military matters, another perform the religious duties, and a third be in charge of hunting or the harvest. Sometimes one clan provided the tribal leaders.

### **Collectivity**

A collective attitude means that each person defines himself or herself in terms of the group — as one part of a whole and dependent on the whole group. Most traditional tribal governments reflected this value. The idea of people doing things or owning things individually did not make sense because each individual was only a part of the whole.

The collective mentality was emphasized in tribal religions, which viewed their people as making up a perfect circle. All peoples together were part of the whole of nature. People were placed in nature and were meant to do their part in that whole. It was not possible to “own” nature, because it was meant to be used by everyone and belonged to the gods or spirits who lived in it.

### **Elements Determining Governing Structure**

A group's size, environment, values and neighboring groups were all key factors determining its form of government. Food sources were especially important. Some tribes had to move in very small groups just to eat. The movement of these groups depended on the weather and the wanderings of animal herds, so it was difficult to plan ahead. The groups, therefore, developed a political system of shifting leadership. Several groups might happen to meet up during one kind

### **Centuries Old, the Iroquois Constitution Remains Intact**

If time is any measure of how sound a tribal government is, then the constitution that holds together the six nations of the Iroquois Confederacy must be rock solid.

The famed Iroquois system dates back centuries, but its exact age depends on which historian is consulted. Some estimate it was first documented in a wampum belt as early as 900 AD. Others fix the date later — closer to the 1500s. Regardless of its age, it still serves as the foundation of the Iroquois political system to this day and it has been in use since long before the first Europeans washed ashore.

The system is a confederacy — a form of government in which independent nations retain their powers of internal sovereignty. They primarily govern themselves and unite under a common structure only for external dealings or when there is a common threat.

The confederacy is made up roughly of two "houses." The first is a council of 50 members that are selected from each tribe by Clan Mothers — the women who head the families. These leaders are subject to "removal" by the woman who selected them if they overstep their authority.

After talking over an issue, the sachems from each tribe come to an agreement and cast one vote, as a unit. All five tribes must agree before an action is taken.

A second group, called the Pine Tree chiefs, gain their position through military accomplishment or other meritorious service. They can speak, but not vote, at the council.

Many academics now believe that the Iroquois government served as a model to the U.S. forefathers when it came time to draft the U.S. Constitution. And more than 200 years after it first caught the eye of Thomas Jefferson and Benjamin Franklin, the Iroquois Constitution still serves the Oneidas, Cayuga, Mohawk, Onondaga, Seneca and the Tuscarora — the six nations that make up the confederacy. The Iroquois political system has weathered centuries and remains virtually unchanged.

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of crisis, and select the appropriate leader on the spot. Another kind of problem would call forth a different person to lead.

Size itself was also important for the form of government. As a people grows larger and more diverse, its governing system tends to become more centralized and complex. A smaller proportion of people exercises authority. Since these tribes were very small, they were direct democracies. Each person helped decide each problem or policy.

Tribes that were bigger and more geographically stable had more leader/representative methods that were similar to republican forms of government.

As they grew larger and had more and more contact with one another, some tribes developed intertribal governing systems that were very much like federal

governments. Each of several tribes or villages would retain basic internal control, but the groups worked as a single unit in external matters.

Values also played a role in shaping different tribal governments. For tribes that emphasized physical strength and military success, the government's leaders were usually old war heroes.

Pueblo governments, on the other hand, could be called theocracies. These tribes were so deeply religious that the leaders in every governing activity were the religious men of the tribe.

Since tribal political rights today are based on the European principles adopted by the United States, it is very important to understand what “seeds” had been planted in the early days. These are the international principles that developed around tribes.

### **Indian Relations in Colonial Times (1492-1776)**

Central to European law at this time was the right of discovery. It held that the country that discovers another land has title to the land and the laws of the discovery country apply in the new land. The fact that the new land was inhabited made little difference. This coupled with the fact that Indians had little concept of land ownership or title, made it easy for the colonists to obtain large tracks of Indian land with Indian consent.<sup>4</sup> And when they couldn't get the consent of the tribe, they could easily take it by force.

Franciscus de Vitoria, a Spaniard with an enlightened view on the subject of aboriginals, wrote in 1532 that “aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the grounds of their not being true owners.”<sup>5</sup>

Vitoria said that European nations could exercise power over the Indians or acquire their land only if by conquest in a “just” war or through voluntary cession and agreements by the Indians. English law, which applied in the original colonies, applied the same policies to Indian tribes as those offered by Vitoria.

Under English law, Indians had the right of occupancy — sometimes called Original Indian Title. Only a sovereign nation could enter into formal agreements with Indian tribes. In the colonies as early as 1651, individual colonists were prohibited from purchasing land from Indian tribes unless the purchase was authorized by the Crown or colonial government. English law also required the just compensation for the taking of land. This applied to treaties with Indians as well as purchases.

During the colonization of America, the British Crown dealt with Indians formally as sovereign nations through treaties. As the colonies grew, the colonists encroached on Indian land and otherwise treated Indians poorly and that resulted in Indian retaliation. In order to avoid prolonged and expensive Indian wars, the Crown and later the nascent U.S. government assumed the role of protector.

In 1763, the Crown outlawed the cession (obtaining by treaty) of Indian land west of the Appalachians. It also centralized the process of licensing and approving all Indian land cessions east of the Appalachians. The following year, the Crown proposed a plan to control all other regulation of Indian affairs through Indian agents. The plan was only partially implemented and never formally approved. It was abandoned in 1768. But in 1775, the English government

revived the concept of centralized management of Indian affairs and appointed Indian agents who reported to London. The next year, the colonists declared their independence from England.

### Indian Relations with the New Nation (1776-1820)

Upon its independence, the new nation inherited the same Indian policy dilemma that had faced England. If Indian affairs were left in the hands of the states, greed for Indian land would result in countless wars with the Indian tribes that would drain the treasury and invite foreign interference on the side of the Indians. In order to achieve some stability, the authors of the Constitution gave the power to regulate Indian affairs to the federal government. Only the President could make treaties with Indian tribes and only with the consent of the Congress. In 1778, the first treaty was signed between a tribe (the Delaware Tribe) and the new government. By signing this treaty, the U.S. government affirmed the British and European tradition of treating tribes as political entities. The federal government was also given the power to regulate interstate commerce and trade, including that with Indian tribes. Congress affirmed this policy in a series of laws passed between 1790 and 1834.

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#### Trade and Intercourse Acts (1790-1834)

- # Prohibited non-Indians from acquiring Indian land by treaty or purchase
  - # Prohibited non-Indian settlements on Indian land
  - # Prohibited non-Indians from hunting or grazing animals on Indian lands
  - # Made trade with Indians subject to federal license and regulation
  - # Made crimes against Indians committed by non-Indians a Federal crime and provided for compensation to Indians
  - # Made government responsible for compensation to non-Indians who prevailed in damage cases involving Indians
  - # Authorized War Department to appoint Indian agents
  - # Did not regulate conduct among Indians
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The Trade and Intercourse Acts, as they were called, subjected nearly all interaction between Indians and non-Indians to federal control. The acts established the boundaries of Indian Country and sought to protect Indians from non-Indians and vice-versa. Non-Indians were not allowed to acquire Indian land, they were not allowed to settle on Indian lands nor to enter those lands for hunting or fishing. Indian agents, under the direction of the War Department, were appointed to act as liaisons between the federal government and the tribes.<sup>6</sup>

Although the Trade and Intercourse Acts attempted to regulate the relations between Indians and non-Indians, they made no attempt to interfere with the conduct of Indians within Indian Country. That matter was left entirely to the tribes.<sup>7</sup>

## SUPREME COURT SHAPES THE FEDERAL RELATIONSHIP<sup>8</sup>

### *Johnson v. McIntosh* (1823)

#### **The First Supreme Court Case Dealing with Indian Affairs**

Before the Non-Intercourse Acts clearly outlawed the purchase of Indian lands by individuals, the sale of Indian land to individuals was not uncommon. In 1823, the Court was asked to review one such transaction.

The Court ruled that the transaction was not valid. Only the federal government had that right. Prior to the founding of the new government, only England had the right to make treaties or contracts with Indian tribes. With the Declaration of Independence, that right transferred to the new nation. Speaking for the majority of the Court, Chief Justice John Marshall stated that, “The Indians retained the right of occupancy which only the discovering sovereign could extinguish, either by purchase or conquest.”

### *Cherokee Nation v. Georgia* (1831)

#### **The First of the Cherokee Cases**

In the early 1800s, Georgia enacted laws that divided the Cherokee territory among counties. Georgia extended state law to these counties, thereby invalidating Cherokee law. Moreover, the state made it illegal for the Cherokee government to pass or enforce laws. The Cherokee sued.

The case is a landmark because the Court had to decide whether the Cherokees had the right to sue the state in federal court. Central to that issue was whether the Cherokee Tribe was a foreign state within the meaning of the constitutional provision giving the Court jurisdiction over suits between foreign nations and governments within the United States.

Writing for the majority, Chief Justice John Marshall concluded that the tribe succeeded in demonstrating that it is a state, a “distinct political society separated from others and capable of managing its own affairs and governing itself.”

Yet the Court held that the tribe was not a foreign nation because its lands were within the boundary of the United States. Indian tribes were deemed “dependent nations.” Indian nations had fewer rights than other nations. For example, the United States could not claim ownership of land in France or Spain. It could, however, claim ownership of Indian land. This meant, among other things, that the United States would not recognize a treaty between a tribe and another country — something the tribes had done during the Revolutionary War and the War of 1812.

As dependent nations, tribes were something between a state and foreign government. This placed Indian tribes in a unique position that required the special protection of the federal government. They were wards of the United States; and in the eyes of the Court, that made the government a trustee.

In law, a trust responsibility is one that must meet the exacting standard of ethical conduct —

such as in trusts established by Last Wills and Testaments. In recognizing the government as a trustee, the Court has required the United States to follow high standards when dealing with or representing the interests of American Indians.

The government still has that trust responsibility today. It is a tough role in which the government must protect and defend American Indian interests while encouraging Indians to become independent. At the same time, the government is responsible for all the other interests for which it has responsibilities. Unfortunately, the government's stewardship as a trustee over the past 150 years has fallen below the high standard envisioned in law.

### ***Worcester v. Georgia (1832)***

#### **The Second Cherokee Case**

A year after the court handed down its famous “dependent nation” rule, it heard another case concerning Cherokees in Georgia. Georgia authorities had arrested several missionaries for violating a state law that required non-Indians residing in Cherokee territory to be licensed by the State. Two missionaries appealed to the Supreme Court.

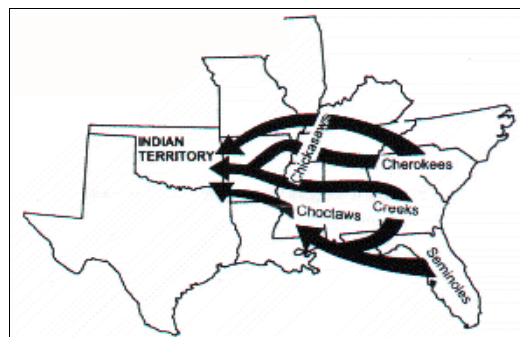
Chief Justice John Marshall concluded that Georgia had no jurisdiction. The tribe had exclusive jurisdiction within the boundaries of the reservation. The case formed the basis for Indian jurisdictional law.

Marshall's definition acknowledged that by 1832 tribal sovereignty had been limited. By accepting the protection of the United States, tribes' external sovereignty was extinguished.

Ultimately, case law began to recognize the power of Congress over tribes. The limitation is often called “the plenary power of Congress” over tribes. This may best be thought of as “complete” but not “absolute” power. Even the “plenary” power of Congress is subject to the due process and other limits of the United States Constitution.

## **THE GOVERNMENT AS A TRUSTEE**

Although the Court was favorable to Indians, Congress and the Executive Branch often were not. In the 19th century, it was the “Manifest Destiny” of the United States to expand and “civilize” the frontier. Indian tribes were impediments to that goal. Repeatedly, they were forced to move farther west to new reservations — to land that the white man did not want until later.



The federal removal policy forced eastern tribes westward to Indian Territory — now the state of Oklahoma.

## Movement to Reservations (1830-1887)

**1830 – Indian Removal Act** — This legislation authorized the forced removal of Indians to reservations. The Trail of Tears and other removal efforts resulted from this legislation.



### THE TRAIL OF TEARS<sup>9</sup>

President Andrew Jackson refused to enforce the court's decision in *Worcester*, and the fate of the Cherokee seemed to be in the hands of the executive branch of the federal government. Even though the Cherokee people had adopted many practices of the white culture, and had used the

court system in two major Supreme Court cases, they were unable to halt the removal process.

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*John Marshall has made his decision,  
now let him enforce it.*

— President Andrew Jackson of *Worcester  
v. Georgia*

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#### **Treaty of New Echota**

The state of Georgia continued to press for Indian lands, and a group of Cherokees known as the Treaty Party began negotiating a treaty with the federal government. The group, led by

Major Ridge and including his son John, Elias Boudinot, and his brother Stand Watie, signed a treaty at New Echota in 1835. Despite the majority opposition to this treaty — opposition led by the Cherokee Principal Chief John Ross — the eastern lands were sold for \$5 million, and the Cherokees agreed to move beyond the Mississippi River to Indian Territory. The Senate ratified the treaty despite knowledge that only a minority of Cherokees had accepted it. Within two years the Principal People were to move from their ancestral homelands.

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*My friends, circumstances render it  
impossible that you can flourish in the  
midst of a civilized community. You have  
but one remedy within your reach, and  
that is to remove to the west. And the  
sooner you do this, the sooner you will  
commence your career of improvement  
and prosperity.*

— President Andrew Jackson

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#### **The Roundup**

President Martin Van Buren ordered the implementation of the Treaty of New Echota in 1838, and U.S. Army troops under the command of Gen. Winfield Scott began rounding up the Cherokees and moving them into stockades in North Carolina, Georgia, Alabama, and Tennessee. Altogether 31 forts were constructed for this purpose — 13 in Georgia, five in North Carolina, eight in Tennessee, and five in Alabama. All of the posts were near Cherokee towns, and they served only as temporary housing for the Cherokees.

As soon as practical, the Indians were transferred from the removal forts to 11 internment camps that were more centrally located — 10 in Tennessee and one in Alabama. In North Carolina, for example, Cherokees at the removal forts were sent to Fort Butler, and by the second week in July on to the principal agency at Fort Cass. By late July 1838, with the exception of the Oconaluftee Citizen Indians, the fugitives hiding in the mountains, and some scattered families, virtually all other Cherokees remaining in the East were in the internment camps.

According to a military report for July 1838, the seven camps in and around Charleston, Tennessee, contained more than 4,800 Cherokees: 700 at the agency post, 600 at Rattlesnake

Spring, 870 at the first encampment on Mouse Creek, 1,600 at the second encampment of Mouse Creek, 900 at Bedwell Springs, 1,300 on Chestooree, 700 on the ridge east of the agency, and 600 on the Upper Chatate. Some 2,000 Cherokees were camped at Gunstocker Spring 13 miles from Calhoun, Tennessee.

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*One by one Indian peoples were removed to the West. The Delaware, the Ottawa, Shawnee, Pawnee and Potawatomi, the Sauk and Fox, Miami and Kickapoo, the Choctaw, Chickasaw, Creek and Seminole. In all some 90 thousand Indians were relocated. The Cherokee were among the last to go. Some reluctantly agreed to move. Others were driven from their homes at bayonet point. Almost two thousand of them died along the route they remembered as the Trail of Tears.*

— Documentary, *The West*  
(Ken Burns/Stephen Ives)

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One group of Cherokees did not leave the mountains of North Carolina. This group traced their origin to an 1819 treaty that gave them an allotment of land and American citizenship on lands not belonging to the Cherokee Nation. When the forced removal came in 1838, this group — now called the Oconaluftee Cherokees — claimed the 1835 treaty did not apply to them as they no longer lived on Cherokee lands. Tsali and his sons were involved in raids on the U.S. soldiers who were sent to drive the Cherokees to the

stockades. The responsible Indians were punished by the army, but the rest of the group gained permission to stay, and North Carolina ultimately recognized their rights. Fugitive Cherokees from the nation also joined the Oconaluftee Cherokees, and in time this group became the Eastern Band of Cherokees, who still reside in North Carolina.

### **Trail Where They Cried**

During the roundup intimidation and acts of cruelty at the hands of the troops, along with the theft and destruction of property by local residents, further alienated the Cherokees. Finally, Chief Ross appealed to President Van Buren to permit the Cherokees to oversee their own removal. Van Buren consented, and Ross and his brother Lewis administered the effort. The Cherokees were divided into 16 detachments of about 1,000 each.

## Water Route

Three detachments of Cherokees, totaling about 2,800 persons, traveled by river to Indian Territory. The first of these groups left on June 6 by steamboat and barge from Ross's Landing on the Tennessee River (present-day Chattanooga). They followed the Tennessee as it wound across northern Alabama, including a short railroad detour around the shoals between Decatur and Tuscumbia Landing. The route then headed north through central Tennessee and Kentucky to the Ohio River. The Ohio took them to the Mississippi River, which they followed to the mouth of the Arkansas River. The Arkansas led northwest to Indian Territory, and they arrived aboard a steamboat at the mouth of Salisaw Creek near Fort Coffee on June 19, 1838. The other two groups suffered more because of a severe drought and disease (especially among the children), and they did not arrive in Indian Territory until the end of the summer.

## Land Routes

The rest of the Principal People traveled to Indian Territory overland on existing roads. They were organized into detachments ranging in size from 700 to 1,600, with each detachment headed by a conductor and an assistant conductor appointed by John Ross. The Cherokees who had signed the treaty of New Echota were moved in a separate detachment conducted by John Bell and administered by U.S. Army Lt. Edward Deas. A physician, and perhaps a clergyman, usually accompanied each detachment. Supplies of flour and corn, and occasionally salt pork, coffee, and sugar, were obtained in advance, but were generally of poor quality. Drought and the number of people being moved reduced forage for draft animals, which often were used to haul possessions, while the people routinely walked.

The most commonly used overland route followed a northern alignment, while other detachments (notably those led by John Being and John Bell) followed more southern routes, and some followed slight variations. The northern route started at, Tennessee, and crossed central Tennessee, southwestern Kentucky, and southern Illinois. After crossing the Mississippi River north of Cape Girardeau, Missouri, these detachments trekked across southern Missouri and the northwest corner of Arkansas.

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*I saw the helpless Cherokees arrested and dragged from their homes, and driven at the bayonet point into the stockades. And in the chill of a drizzling rain on an October morning I saw them loaded like cattle or sheep into six hundred and forty-five wagons and started toward the west .... On the morning of November the 17th we encountered a terrific sleet and snow storm with freezing temperatures and from that day until we reached the end of the fateful journey on March the 26th 1839, the sufferings of the Cherokees were awful. The trail of the exiles was a trail of death. They had to sleep in the wagons and on the ground without fire. And I have known as many as twenty-two of them to die in one night of pneumonia due to ill treatment, cold and exposure ...*

— Private John G. Burnett,  
Captain Abraham McClellan's Company,  
2nd Regiment, 2nd Brigade, Mounted  
Infantry – Cherokee Indian Removal, 1838-39

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Road conditions, illness, and the distress of winter, particularly in southern Illinois while detachments waited to cross the ice-choked Mississippi, made death a daily occurrence. Mortality rates for the entire removal and its aftermath were substantial, totaling approximately 8,000.

Most of the land route detachments entered present-day Oklahoma near Westville and were often met by a detachment of U.S. troops from Fort Gibson. The army officially received the Cherokees, who generally went to live with those who had already arrived, or awaited land assignments while camped along the Illinois River and its tributaries east of present-day Tahlequah.



## **The Saga of Teton Indians**

European immigrants pushed westward in the search for land and riches. The railroad, telegraph, and the promise of gold made the plains of the Midwest more appealing to white settlers. This put more pressure on the U.S. government to reduce the size of reservations and encroach on land set aside exclusively for the use of Indians. A series of optimistic and untenable treaties were signed between tribal leaders who were unable to grasp the full meaning of the document and federal officials who did not understand the limitations of tribal chiefs.<sup>10</sup>

The Black Hills were the center of the universe for the Teton Dakota (Sioux). It was where the gods lived; where warriors went to speak with the Great Spirit and await a vision. In 1868, the U.S. government thought the Black Hills were worthless and gave them to the Dakotas forever by treaty. But there were rumors of gold there and by 1874, the Army was ordered to make a reconnaissance into the Black Hills. The 7<sup>th</sup> Calvary, led by Lt. Col. George Armstrong Custer, was dispatched. The Army did not inform the Dakota of their plans, even though the treaty of 1868 stipulated that whites were not allowed in the Black Hills without the permission of the Indians.<sup>11</sup>

When Custer reported that the Black Hills were filled with gold, white prospectors began clamoring for a chance to mine and pan. Despite government orders to the contrary, thousands staked claims in the Black Hills, which angered the Dakota, who had been promised exclusive use of their sacred land. When Indians found white settlers on their land, they chased them out or killed them. The Army was charged with restoring order by curbing the Indians' activity, but they seldom enforced the 1868 treaty by driving white miners out of the Black Hills. A government commission tried and failed to get the Sioux to sell the Black Hills. After meeting with the Dakota leaders, the commission returned to Washington and recommended that Congress ignore the Indians' efforts to keep the Black Hill and force the Sioux to accept a fixed sum "as fair equivalent of the value of the hills."

Clashes between the Army and the Indians came to a head in the summer of 1876 at the river the Indians called the Greasy Grass and the whites called the Little Big Horn. All the Teton bands

were there along with their allies the Cheyenne and Arapaho. They had gathered at the Greasy Grass to hold a Sundance (ritual dance) and hunt buffalo in violation of a government order that they return to their reservations or be considered hostile Indians. The Army was sent to discipline them. Custer came upon the gathering two days ahead of the other divisions and was spotted by the Indians about eight miles away from their camp. Ignoring the advice of his Indian scouts, Custer split his division into four parties and attacked the village. Within hours, the Sioux, Cheyenne and Arapaho disposed of all four parties, killing Custer and his men and handing the Army one of its greatest defeats in its war against the Indians.

After the battle at the Greasy Grass, the Indian bands broke camp and drifted their own way. Sitting Bull, leader of the charge against Custer, took his band into Canada, where they sought the protection of England. The Oglala Sioux warrior Crazy Horse died the next year, bayoneted while in the custody of the Army. The Cheyenne, under the leadership of Dull Knife and Little Wolf, fought their way northward for the next several years only to be defeated. The Nez Perce under the leadership of Chief Joseph entered the plains territory in the hopes of finding sanctuary in Canada. They too were defeated and sent back to life on a reservation.

In the cities, the tanners found a way to make the thick hide of the buffalo usable and — more importantly — saleable. White buffalo hunters moved onto the Plains in 1877 and in less than 10 years nearly wiped the animal out. Their main source of food gone, the Indians survived on government rations and skinny range cattle supplied by the U.S. government. Disarmed and unable to feed or clothe themselves, the Sioux watched helplessly as more and more white settlers moved into their Black Hills and the government reduced the size of their reservation. Unable to convince the Canadian government to give them a reservation, in 1881 Sitting Bull and his followers surrendered to U.S. Army officials and they were imprisoned at Fort Randall for two years. In 1889, the Great Sioux Reservation — promised to the Sioux in perpetuity — was broken up into smaller parcels of land surrounded by white settlers. Sitting Bull was killed on December 15, 1890, as Indian police attempted to arrest him at his cabin on the Standing Rock reservation for practicing the Ghost Dance religion, which advocated peace and promised the return of the buffalo and the sacred Black Hills to the Sioux. The ritual dance frightened white settlers who were threatened by the strength Indians derived from it. They demanded that the Army take action to stop it.

Big Foot's band of Miniconjou Sioux, about 300 strong, had fled the reservation to dance the Ghost Dance. They camped overnight at the Wounded Knee Creek. On December 29, 1890, troops were sent to disarm the 106 warriors in the band and send them back to the reservation. A shot was fired and in the ensuing battle, about 200 Indians were killed — half of them women and children. Thirty-one soldiers died as well. In January 1891, the Indian Wars, as they were known, officially came to an end. An Arapaho medicine man carried the Ghost Dance south to the Oklahoma Indian territory where it survived as a social dance but lost its spiritual significance.



### **1871 – Congress passes law prohibiting any further treaties with Indians**

The House of Representatives resented the fact that only the President and the Senate were involved in the treaty-making process, thereby excluding the House from the development of Indian policy. Congress wanted to distance Indians and non-Indians. It also wanted to civilize the Indians and assimilate them into American culture. Reservations established after 1871 were established by statute or executive order. This removed tribes from the status of quasi-foreign political entities and weakened their political status.

Dating back to Colonial times, Indian tribes had always been treated as self-governing bodies. England and later the United States recognized this by always obtaining their consent (in the form of treaties) regarding policies that would affect them. The law did not change the requirement for mutual agreement. However, in reality, the need for mutual consent was only applied when the tribes had the upper hand. As the new nation grew in power, military force or the withholding of food and blankets was used to make tribes submit to policies that did not benefit them.

### **1883 – The Courts of Indian Offenses were established.**

The Courts of Indian Offenses were established by the Department of Interior for tribal governments to handle less serious crimes using federal law instead of tribal law or customs.

### **1883 – Ex Parte Crow Dog**

The U.S. Supreme Court ruled the murder of an Indian by another Indian was a tribal matter and that tribal law applied. In response to the ruling, Congress passed the Major Crimes Act declaring murder and other serious crimes on Indian lands to be Federal offenses that could be heard only in Federal court. This law severely eroded tribal sovereignty and traditional Tribal laws.

## **Allotment Period (1887-1928)<sup>12</sup>**

### **1887 – The Allotment Act**

In 1887, tribes were miserably poor, confined to reservations, and enfeebled as governing powers. Still, they clung to the remains of their social structure. Tribes still holding land in common, followed their old customs, and preserved what they could of their political systems. Thus, the national fever to “civilize” rose higher. The Allotment Act of 1887 represents an extreme federal attempt to assimilate Indians and weaken their governments.

Allotment means that reservations were broken up into parcels of land, and allotted or assigned to individual Indians. Allotted lands were to be held in trust by the United States for 25 years or longer. After that, the individual would own the land and the state would have jurisdiction over it.

The Allotment Act was an attempt to change Indian culture by changing its economic basis. Individual ownership represents a dramatically different set of values from collective ownership.

Sympathetic whites thought that Indians would be lifted up out of poverty by learning to be individual land owners and farmers. By cultivating “selfishness,” they would join the rest of civilization and prosper.

Allotment was also an attempt to eliminate tribal governments. It should be clear that a government cannot really remain a government without a land base. Governing power must be defined and exercised in space. When tribal territory was broken up into property, and jurisdiction transferred to the states, tribes received the most crushing kind of political blow. With loss of control over its territory, tribal government lost control over its membership.

Meanwhile, tribes as political entities were being undermined in other ways. Federal administrators ignored tribal governments as much as possible. Administrators either chose “leaders” other than the tribe had chosen, or insisted on dealing only with individual Indians. Sometimes Native religions and customs were prohibited. Indian children were placed in boarding schools, away from the influence of the family, the tribe and the Native language.

### **Transitional Days — The 1920s**

By the early 20th century, most tribes' traditional political systems had been dismantled. The unique relationship between the tribes and the federal government was on the brink of vanishing. The allotment/assimilation era brought the darkest days that Indian people would ever see.

#### **1924 – Indian Citizenship Act**

The Indian Citizenship Act of 1924 granted Indians full rights as citizens of the United States. This legislation in part reflected the federal government’s hopes that Indians were about to enter the dominant culture. The Citizenship Act, though, really represents transition. Many people who supported it knew that Indians could not be pushed around so easily if they had the rights of citizens. By the time of this Act, things were about to brighten for tribes.

By the 1920s, tribal people had been through an onslaught that is astonishing — war, smallpox, and near starvation, removal and allotment of land. They had watched the dismantling of their governments, and the prohibition of their religion and traditions.

Yet what is more astonishing is that tribes still existed at all — as a problem or a curiosity to white people, but still there. They had not been assimilated, and they clung to their tribal identity.

What had enabled tribes to survive into the 1920s — and later, through the termination attempt of the 1950s, until today? Any answer to this question must have two elements.

#### **Strength of Culture**

The first element of the answer is culture. Culture’s remarkable strength is revealed in the history of tribal people. Tribes as political entities and governments were all but destroyed by the early

20th century, but Indians continued to act and think as tribes. They kept what they could of their political ways, their view of the world, and their bonds with one another. As cultural entities, they remained.

However, culture does not account for the survival of the unique relationship between the tribes and the United States. The important thing about this relationship is that it is a relationship between governments. Thus, the other part of our answer lies in political facts.

### **Law**

Ultimately, two political facts worked to protect tribal existence. The first is this: the United States, as a political entity, is based on law; and certain laws worked for the benefit of tribes. According to U.S. law, Congress wields “plenary power” over tribes and can use this power to redefine tribal political status, but tribal sovereignty can be limited only by specific, definite laws of Congress. Powers that have not been specifically taken away remain tribal powers.

During the assimilation period, the legislative and executive branches of the U.S. government took step after step to limit tribal power. However, the federal judiciary kept finding areas of sovereignty that had not been specifically removed.

### **The Abstract Principle**

A second political fact proved even more important than specific laws. This second fact is that all U.S. laws are firmly based on an abstract principle, or belief, that is nearly sacred: Americans believe in the consent of the governed. This idea guides American government and was a principal that sparked the American revolution.

Congress knew that tribes had never consented to be governed by the United States. That is why they could not destroy the unique relationship.

Americans might push the “plenary power” concept to new extremes, informally ignore the laws, or wear away tribal existence indirectly. They would not, however, take the final step of legislating tribes out of existence without tribal consent. They might trick, bribe, or bludgeon the Indians into consenting — but they needed to have that consent.

A skeptic might see this hunger for consent as mere concern for appearances, rather than true dedication to a principle. But that principle of consent of the governed in one way or other may have proved to be the salvation of the tribes.

### **Today’s Government-to-Government Relationship<sup>13</sup>**

A brief summary of key legislation and policy affecting tribes since the 1930s follows.

#### **1934 – Indian Reorganization Act**

The enactment of the Indian Reorganization Act of 1934, or IRA, reversed the federal

government's policy of undermining tribal sovereignty. The Act halted the allotment of tribal land and extended indefinitely the period in which lands would be held in trust for the tribes. A major purpose of this Act was to reaffirm and strengthen tribal government by enabling tribes to draft their own constitutions and to establish their own governing bodies. Most of these original constitutions are still in effect.

### **1950s – Public Law 280**

The federal government reversed its policy of encouraging tribal sovereignty in the 1950s with the adoption of Public Law 83-280 (P.L. 280). Public Law 280 gave certain states civil and criminal jurisdiction over Indian communities. The federal policy of assimilation was once again reasserted at the expense of the development of tribal governments.

Although the tribal government termination policy embodied in P.L. 280 has been abandoned, some of its effects linger. The following states still have jurisdiction over tribes in some or all of the Indian country within the states: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin.

### **1968 – The Indian Civil Rights Act (ICRA)**

The Indian Civil Rights Act of 1968 imposed many of the same requirements of the Bill of Rights that the U.S. Constitution imposes on federal and (by amendment) state governments. There was some initial disagreement about whether a tribe could define “due process” and “equal protection,” or whether it had to follow the specific definitions used by the federal government. There also was disagreement about whether the ICRA gave federal courts the power to hear cases that arose within the tribe.

Federal courts do not hear cases concerning civil rights in a tribal context except when an individual questions a tribe's right to confine him or her. If federal courts had gained this type of jurisdiction over Indian court decisions, tribal jurisdiction would have been eroded. ICRA also does not require jury trials or free lawyers in all instances because requiring certain standards of due process, such as legal representation, and in some instances jury trials, the federal government would have placed a heavy burden on tribal governments since no funds were available for these procedures.

### **1971 – The Alaska Native Claims Settlement Act (ANCSA)**

The Alaska Native Claims Settlement Act (ANCSA) was enacted to extinguish all aboriginal title in Alaska based on use and occupancy. In payment for the extinguishment of title, Native groups received \$962,500,000 and 40 million acres of public federal land. The Act also provided for the establishment of regional and village corporations to which Alaska Natives (who were alive at the time of the Act's enactment) would receive corporate stock. ANCSA was enacted at the end of the termination policies of the 1950s and 1960s and in the early days of the self-determination era. Many believe ANCSA includes elements of both these conflicting policies. It required the Alaska natives to set up state chartered corporations to administer the settlement fund at the same time that it extinguished the original land claims and released hunting and fishing rights claimed

by the tribal governments. In doing so, it left the tribal governments with a still disputed claim as to the scope of the territory they governed. Alaska also set up an intricate land ownership arrangement.

### **1975 – Indian Self-Determination and Education Assistance Act**

The Act was designed to provide for the maximum participation of tribes in federal programs concerning Indians by encouraging tribes to contract with the federal government to run education, health or other programs. In subsequent years this legislation was amended and liberalized to give tribes greater authority to contract and later “compact” for these services with the maximum of tribal control and much reduced federal bureaucratic interference.

### **1978 – Indian Child Welfare Act**

The Act was enacted to stem the tide of adoption and foster child placements outside of Indian communities or families and permitted tribes to intervene in state court child custody proceedings or require adjudication of these issues in tribal court.

### **1988 – Indian Gaming Regulatory Act**

Standards and a commission were set up to ensure that gaming activities continue to benefit government, economy and self-sufficiency of tribes.

## **HISTORY OF THE BUREAU OF INDIAN AFFAIRS<sup>14</sup>**

The mission of the Bureau of Indian Affairs is to act as the principle agent of the United States in carrying out the government-to-government relationship that exists between the United States and the federally recognized American Indian tribes; and, to act as principle agent of the United States in carrying out the responsibilities the United States has as a trustee for property it holds for federally recognized tribes and individual American Indians.

While the Bureau of Indian Affairs did not receive congressional authorization until 1834 — 10 years after it had been administratively established by the Secretary of War — the stage was set for its creation in the earliest days of the U.S. government.

One of the first actions taken by the Continental Congress in 1775 was to name a Committee on Indian Affairs. The committee established three departments of Indian Affairs and called upon such prominent Americans as Benjamin Franklin and Patrick Henry to assume leadership roles in the operation of these offices.

Henry Knox, Secretary of War, assumed responsibility for Indian affairs with the ordinance of August 7, 1786. The first Congress continued administration of Indian affairs within the War Department, established in 1789, with direction to the Secretary to place armed militia at the disposal of Indian commissioners “for negotiating treaties with the Indians.”

Trading houses were maintained from 1786 to 1822 to supply Indians with necessary goods and, in exchange, to offer them a fair price for their furs. This was a matter of importance and concern for the government. As a result, the office of Superintendent of Trade was created in 1806 to place some controls on the practice of trading with Indians.

Without authorization from Congress, Secretary of War John C. Calhoun on March 11, 1824, created what he called the Bureau of Indian Affairs. The logical choice to head this office was Thomas McKenny, who had been Superintendent of Trade when that post was abolished two years earlier.

The matter of giving its approval to the establishment of an Indian office was vigorously debated in the Congress. But before such a measure was passed, the lawmakers created the position of Commissioner of Indian Affairs.

On July 9, 1832, Congress authorized the President “to appoint by and with the advice and consent of the Senate, a Commissioner of Indian Affairs, who shall, under the direction of the Secretary of War, and agreeable to such regulations as the President may, from time to time, prescribe, have the direction and management of all Indian affairs, and of all matters arising out of Indian relations.” The first presidentially appointed Commissioner was Elbert Herring. His salary was set at \$3,000 per year.

In the first session of the 23rd Congress in 1834, the Committee on Indian Affairs of the House of Representatives produced three bills dealing with Indian affairs. These included measures to (1) organize a Department of Indian Affairs, (2) regulate trade with Indians, and (3) provide for the establishment of a western territory in which the Indians should be separated.

The third measure did not pass, but the other two were enacted into law. On June 30, 1834, the Bureau of Indian Affairs came into being through what has since become known as the organic law of the Indian office. The organizational structure of Indian affairs during the 1800s primarily included two types of field jurisdictions, superintendents and agents. The superintendents were generally responsible for Indian affairs within a geographical area, usually a territory. Agents, some reporting to superintendents and others directly to the Indian affairs office, were concerned with the affairs of one or more tribes.

The Bureau of Indian Affairs was to remain in the War Department for 15 years after its creation by Congress. An Act on March 3, 1849, established the Home Department of the Interior, and Indian affairs passed from military to civilian control.

Development of the reservation system gained momentum in the mid-1850s after experimentation with the reservation policy in California. The role of the Bureau changed in the last quarter of the 1800s, and specialized activities such as irrigation, forestry, Indian employment, law enforcement, health, and construction became increasingly more important.

Education of young Indians came to the forefront in 1879, when the first off-reservation boarding school was established at Carlisle, Pennsylvania. Chemwa Indian School in Oregon, Haskell Institute in Kansas, and Chilocco Indian School in Oklahoma were opened within the next five years. Other schools were to follow.

After World War II, a system of area offices was established and area directors were made responsible for administering all Indian programs within their geographical locations. This three-tier structure continues today, with organizational lines extending from Washington, D.C., to the area offices to the agencies at the reservation level.

Until 1973, the Bureau of Indian Affairs was placed organizationally under an Interior Department assistant secretary, whose principle responsibilities revolved around land and water resources or other Interior programs. Indian affairs was a secondary concern of this official and frequently Indian goals and objectives were opposed by other Interior agencies. This situation was partially corrected when Morris Thompson became Commissioner in 1973 and was made directly responsible to the Secretary of the Interior.

Finally, in 1977, the post of Assistant Secretary-Indian Affairs was created, thereby assuring the Bureau of a voice in policy matters within the Interior Department. Forrest Gerard, a member of the Blackfeet Indian tribe, became the first to fill this office.

## **Historical and Legislative Timeline of Federal Indian Policy**

### **1776-1871 — THE FORMATIVE YEARS**

1776	Treaties and other agreements
1787	The Northwest Ordinance
1790	Congress defines “Indian Country”
1790	Non-Intercourse Act, 25 U.S.C. 177
1808	Assimilative Crimes Act, 18 U.S.C. 13
1817	General Crimes Act, 18 U.S.C. 1152
1830	Indian Removal Act, 4 Stat., 411
1831-32	U.S. Supreme Court Justice John Marshall’s “trilogy” of cases establishing fundamental Constitutional Indian law

### **1871-1928 — ALLOTMENT AND ASSIMILATION**

1871	Congress eliminates treaty making with Indian tribes
1883	Crow Dog Ex Parte, 109 U.S. 556
1883	Counts of Indian offenses established
1885	Major Crimes Act, 18 U.S.C. 1153, 3242
1887	General Allotment Act (Dawes Act), 25 U.S.C. 331-334, 339, 3441, 342, 348, 349, 354, 381
1908	Winters Doctrine of Reserved Indian Water Rights, 207 U.S. 564

1909 Leasing of Allotted Lands for Mining Purposes, 25 U.S.C. 396  
 1910 Sale of Timber on Lands Held Under Trust, 25 U.S.C. 406  
 1910 Sale of Timber on Unallotted Lands, 25 U.S.C. 407  
 1921 Snyder Act, 25 U.S.C. 13  
 1924 Indian Citizenship Act, 8 U.S.C. 1401

### **1928-1953 — INDIAN REORGANIZATION**

1928 Meriam Report on Indian Policy of the Allotment Period  
 1934 Indian Reorganization Act (Wheeler-Howard Act), 25 U.S.C. 461  
 1938 Indian Mineral Leasing Act, 25 U.S.C. 396a-396g  
 1938 Leasing of Allotted Lands for Mining Purposes, 25 U.S.C. 396  
 1943 Congress clarifies “Indian Country,” 18 U.S.C. 1151  
 1948 Rights of Ways for All Purposes Across Any Indian Lands, 25 U.S.C. 323

### **1953-1968 — TERMINATION ERA**

1953 H.C.R. 108 Termination Resolution  
 1953 Passage of laws to terminate over 100 tribes  
 1953 Public Law 83-280, Limits of State Jurisdiction 18 U.S.C. 1162, 28 U.S.C. 1360  
 1955 Lease of Restricted Lands for Public, Religious, Educational, Recreational, Residential, Business, and Other Purposes; Approval by Secretary, 25 U.S.C. 415

### **1968-1982 — INDIAN SELF-DETERMINATION**

1964 *Arizona v. California* established method for quantifying Indian Water Rights, 373 U.S. 546  
 1968 Indian Civil Rights Act, 25 U.S.C. 1301 et seq  
 1970 President Nixon’s message, “Recommendation for Indian Policy”  
 1971 Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq  
 1974 Indian Finance Act, 25 U.S.C. 1451 et seq  
 1975 Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450-450n, 455-458e  
 1976 *Bryan v. Itasca County, MN*, U.S. 373  
 1978 Indian Child Welfare Act, 25 U.S.C. 1901 et seq  
 1978 American Indian Religious Freedom Act, 42 U.S.C. 1996  
 1980 Alaska National Interest Lands Conservation Act, 16 U.S.C. 3111 et seq

## 1982-Present — SELF-GOVERNANCE

1982	Tribal Tax Status Act, 96 Stat. 2607
1982	Indian Mineral Development Act, 25 U.S.C. 2101
1987	Cabazon, 480 U.S. 202
1988	Indian Gaming Regulatory Act, P.L. 100-497, 102 Stat. 2467
1988	Amendment to Self-Determination and Education Assistance Act, 25 U.S.C. 450-450n, 455-458e
1988	Self-Governance Demonstration Project
1990	Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001
1990	Indian Law Enforcement Act, 25 U.S.C. 2801
1990	<i>Duro v. Reina</i> , 495 U.S. 676
1991	Legislation reversing <i>Duro v. Reina</i> , enacted by Congress
1994	The Tribal Self Governance Act of 1994, 25 U.S.C. 458 Part D
1994	Indian Self-Determination Act amendments
1996	<i>Seminole</i> Decision
1996	Native American Housing Assistance and Self-Determination Act (NAHASDA)
1998	President Clinton's Executive Order, "Consultation & Collaboration with Indian Tribal Governments"
1999	<i>Minnesota v. Mille Lacs Band of Chippewa Indians</i> (U.S. Supreme Court) <sup>15</sup>

## Endnotes

- 1.Rand McNally; *Discovery Atlas of Native Americans*; (c) 1994 Rand McNally and Company.
- 2.Brown, Dee; *Bury My Heart at Wounded Knee: An Indian History of the American West*; (c) 1970 Dee Brown; Published 1972 Bantam Books.
- 3.O'Brien, Sharon; *American Indian Tribal Governments*; University of Oklahoma Press, Norman, Oklahoma; p.14.
4. "Working Effectively With Indian Tribes;" (c) 1997 Falmouth Institute.
- 5.De Indis Et De Iure Belli Relectiones 128 (E. Nys ed., J. Bates trans. 1917)
- 6.Canby, William C., Jr.; *American Indian Law in a Nutshell*; West Group, Minneapolis, Minnesota, 1998.
- 7.Id. at 4.
- 8.Id. at 4.
- 9.Trail of Tears National Historic Trail, Comprehensive Management and Use Plan, U.S. Dept of Interior, National Park Service
- 10.Turner, Geoffrey; *Indians of North America*; (c) 1979 Sterling Publishing Co.
- 11.Id. at 2.
- 12."Basic Indian Law;" (c) 2000 Falmouth Institute
- 13.Ibid.
14. From the Department of Interior, Bureau of Indian Affairs Web site
15. Ibid.

## SUGGESTED ACTIVITIES

### Read and Discuss

*Bury My Heart at Wounded Knee: An Indian History of the American West*, by Dee Brown, is a classic that chronicles the sad and shameful dealings that transpired between the United States and Indian tribes in the West. A couple of questions to consider: Could the outcome have been different? What shaped America's Indian policy?

*Andrew Jackson and His Indian Wars*, by Robert V. Remini, is hailed as a “thought-provoking” analysis of one of the most controversial aspects of Andrew Jackson's long career — the expulsion of American Indians from the eastern half of the United States. A question for discussion: Remini contends that despite the cruelty and injustice of Andrew Jackson's removal policy, it in fact, ensured the tribes' survival, for they would have been exterminated had they remained in the east. Do you agree or disagree?

### Explore the Web

1. Find photos or depictions of these two important Indian documents: **Hiawatha Belt**, which depicted the original Iroquois constitution, and **Two-Row Wampum Belt**, which depicted the treaty between the Iroquois and the colonists. The Hiawatha Belt shows the original five tribes of the Iroquois Confederacy. A central government — the Onondagas — acted as the flame keepers and as the host for the five tribes when it was time to come together. The government is depicted by the pine tree. Two-Row Wampum Belt shows the agreement between the Iroquois and the colonists with whom the Indians would exist side-by-side. The belt symbolized two rivers — one for the Iroquois and one for the white settlers — running parallel to each other, but not intersecting.
2. Find and print a map of Indian land in 1492.
3. Find and print a map of Indian land in 1800.
4. Find and print a map of Indian land in 1830.
5. Find and print a map of Indian land in 1880.
6. Find and print a map of Indian land in 1900.

### Suggested Videos

1. *The West* by Ken Burns, PBS documentary.
2. *Black Robe*.